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No. 80-1781

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM H. MCNICHOLS, JR., ET AL., PETITIONERS

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether lists of addressees collected and utilized by the Bureau of the Census in fulfilling its duties under the Census Act, 13 U.S.C. 1 *et seq.*, are privileged from disclosure in civil discovery.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and rule involved	2
Statement	3
Summary of argument	11
Argument:	
Address lists compiled by the Bureau of the Census are privileged from disclosure in civil discovery	15
A. The Census Act prohibits disclosure of Census Bureau Address lists	16
B. Census Bureau address lists are absolutely privileged and thus are not subject to civil discovery	22
C. The privilege protecting Census Bureau address lists from disclosure does not offend the constitutional guarantee of equal representation	31
Conclusion	39

TABLE OF AUTHORITIES

Cases:

Association for Women in Science v. *Califano*, 566 F.2d 339	24
Baldrige v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981)	3, 11, 12, 16, 18, 20, 22, 30
Burns v. *Richardson*, 384 U.S. 73	37
Carey v. *Klutznick*, 653 F.2d 732	13, 25, 37
CPSC v. *GTE Sylvania, Inc.*, 447 U.S. 102	25
Farnsworth Cannon, Inc. v. *Grimes*, 635 F.2d 268	33
FTC Line of Business Report Litigation, In re, 595 F.2d 685, cert. denied, 439 U.S. 958	28-29

Cases—Continued Page

Federation for American Immigration Reform (FAIR) v. *Klutznick*, 486 F. Supp. 564, appeal dismissed, 447 U.S. 916, aff'd on remand, No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981) 38
Freeman v. *Seligson*, 405 F.2d 1326 26
Gaffney v. *Cummings*, 412 U.S. 735 ..... 15, 33
Kirkpatrick v. *Preisler*, 394 U.S. 526 ..... 36, 37
Mahan v. *Howell*, 410 U.S. 315 38
Roviaro v. *United States*, 353 U.S. 53 33
St. Regis Paper Co. v. *United States*, 368 U.S. 208.. 13, 20, 26, 27, 28, 29, 30
Seymour v. *Barabba*, 559 F.2d 806 ..... 18, 19, 25
Totten v. *United States*, 92 U.S. 105 33
Trammel v. *United States*, 445 U.S. 40 32
United States v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 ..... 29, 30, 35-36
United States v. *Coplon*, 185 F.2d 629, cert. denied, 342 U.S. 920 ..... 32, 33
United States v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 68,383 36
United States v. *O'Neill*, 619 F.2d 222 24
United States v. *Reynolds*, 345 U.S. 1 ..... 23, 33
United States v. *Turkish*, 623 F.2d 769, cert. denied, No. 80-436 (Jan. 12, 1981) 32
Wesberry v. *Sanders*, 376 U.S. 1 36
Young v. *Klutznick*, 652 F.2d 617 38

Constitutions, statutes, and rules:

United States Constitution:
Article I, Section 2 3
Fourteenth Amendment, Section 2 ..... 3, 36-37
Colo. Const. art. V, § 48(1)(a), (e) 39
Census Act, 13 U.S.C. 1 *et seq.*:
13 U.S.C. 1(3) 19
13 U.S.C. 6(c) 19
13 U.S.C. 8 6
13 U.S.C. 8(b) 2, 12, 17, 18, 19, 20, 21, 26
13 U.S.C. 9 ..... 6, 11, 17, 25, 28, 30
13 U.S.C. 9(a) 2, 12, 17, 21, 26
13 U.S.C. 9(a)(1) 12, 18, 26

Constitutions, statutes, and rules—Continued Page

13 U.S.C. 9(a)(2) 12, 18, 19
13 U.S.C. 21 3
13 U.S.C. 23(c) 17
13 U.S.C. 141(a) 3
13 U.S.C. 141(c) 37
13 U.S.C. 214 ..... 17, 31
13 U.S.C. 301 26
13 U.S.C. 302 26
28 U.S.C. 1292(b) 10
Colo. Rev. Stat. (1980):
§§ 2-1-101 *et seq.* 39
§§ 2-2-101 *et seq.* 39
Fed. R. Civ. P.:
Rule 26 25
Rule 26(b) 2, 23
Rule 26(b)(1) 13, 23
Fed. R. Evid. 501 24

Miscellaneous:

Bureau of the Census, *Current Population Reports, Federal-State Cooperative Program for Population Estimates, Series P-26*, Nos. 17 (Feb. 1973), 62 (Apr. 1974), 103 (Apr. 1975), 75-6 (Aug. 1976), 76-6 (July 1977), 77-6 (Apr. 1979), 78-6 (Nov. 1979) 7-8
C. Kaplan & T. Van Valey, *Census '80: Continuing the Factfinder Tradition* (Department of Commerce 1980) 21
H.R. Rep. No. 2437, 87th Cong., 2d Sess. (1962) 28
10 *Moore's Federal Practice* (2d ed. 1979) 25
Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142 (1976) 26
Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183 (1973) 24
S. Rep. No. 2218, 87th Cong., 2d Sess. (1962) 28
8 J. Wigmore, *Evidence* (McNaughton rev. 1961) 24, 25
8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1970) 24

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. Br. App. B-1 to B-5)[1] is reported at 644 F.2d 844. The order of the district court (Pet. Br. App. A-1 to A-6) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1981. The petition for a writ of certiorari was filed on April 24, 1981, and was granted on June 15, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] "Pet. Br. App." refers to the appendix to petitioners' brief on the merits.

STATUTES AND RULE INVOLVED

Section 8(b) of the Census Act, 13 U.S.C. 8(b), provides in pertinent part:

> Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent * * *.

Section 9(a) of the Census Act, 13 U.S.C. 9(a), provides in pertinent part:

> Neither the Secretary [of Commerce], nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Rule 26(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) Parties may obtain discovery regarding any matter, not privileged, which is relevant to

the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

STATEMENT

1. Article I, Section 2 of the Constitution, as amended by Section 2 of the Fourteenth Amendment, mandates that the members of the House of Representatives "be apportioned among the several States * * * according to their respective Numbers, which shall be determined * * * [by] actual Enumeration * * * every * * * ten Years, in such Manner as [Congress] shall by law direct." Pursuant to this authority, Congress directed the Secretary of Commerce (through the Bureau of the Census) to conduct a census of the population on April 1, 1980. 13 U.S.C. 141(a), 21.

In the course of carrying out its duties in connection with the 1980 decennial census, the Census Bureau prepared master address registers for each of some 300,000 enumeration districts in the country.[2]

[2] As we have explained in our brief in *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981) (at 3 n.1), an "enumeration district" is a small geographical area established by the Census Bureau as a basic unit for data collection and tabulation. We are sending petitioners and amici copies of our brief in *Baldrige* v. *Shapiro*.

The lists of addresses included in the master address registers were developed initially through the use of commercial mailing address lists, census postal checks, and preenumeration canvassing by census personnel (J.A. 44-45). The Bureau mailed out its questionnaires to all addresses on the master registers for response on or about the census date, April 1, 1980 (J.A. 45-46). At the national level, about 85% of the households returned their questionnaires (J.A. 44). Thereafter, in a procedure known as "Followup One," Census Bureau employees visited each address from which a questionnaire was not returned, conducted interviews where possible, and, as to the remaining addresses, compiled information on whether the dwelling units at those addresses were occupied or vacant (J.A. 46-47). The census enumerators did not classify a unit as "vacant" without verifying the unit's status through personal interviews with either property owners or neighbors (J.A. 48, 50). In addition, the enumerators added to their master registers newly observed units that had not been previously listed, and sought personal interviews with the occupants of those units (J.A. 47).[3]

After completion of Followup One, the Census Bureau provided preliminary working figures to the City of Denver, indicating an initial population count of approximately 455,000 (J.A. 47, 56). These working figures were submitted as part of the Bureau's Local Review Program, which afforded

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[3] In determining whether a particular building should be classified as residential, census personnel were instructed to list every structure, regardless of its condition, unless it was obvious that the structure had no space devoted to residential use (*e.g.*, a commercial establishment, a barn, a garage with no living quarters above it) (J.A. 49).

local government officials an opportunity to review and comment on the Bureau's housing tabulations before those figures became final (9/15/80 Tr. 124). Under the program, local officials had 10 working days to submit any data demonstrating inaccuracies or other problems with the Bureau's figures (J.A. 52-55; Def. Exh. C).[4] The City challenged the Bureau's figures with respect to the number of vacant housing units, claiming that the Bureau misclassified housing units as vacant by a factor of 46% (J.A. 35, 83-84). In addition, the City requested the Bureau to furnish it with address lists of vacant housing units so that the City could "determine the validity of [the Bureau's] data" (J.A. 83). The Bureau asserted that the differences between its vacancy figures and the City's were largely attributable to substantial differences in definition and methodology (J.A. 69-72, 85-86)[5] and refused to disclose its address lists of vacant units,

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[4] The Census Bureau provided local governments with aggregate information for each enumeration district, including the number of housing units, the number of vacant housing units, population totals and population per household totals (J.A. 47). The local governments were afforded the opportunity to analyze the census housing data in light of data available to the local governments and to identify suspected discrepancies at the enumeration district level (9/15/80 Tr. 124).

[5] For example, the Bureau noted that "housing units under construction but with the interior protected from outside elements are classified as vacant in the census, while local vacancy estimates frequently do not include housing units under construction. In addition, housing units occupied by persons with a usual residence elsewhere are classified as vacant by census definition. They are seldom included in local vacancy estimates" (J.A. 85-86).

claiming that the lists contain information, "such as house numbers and street addresses," that are subject to the confidentiality provisions of the Census Act, 13 U.S.C. 8 and 9 (J.A. 86).

While the City and the Bureau were engaged in the local review process, the Bureau conducted "Followup Two," in which different, specially-trained enumerators visited all units originally listed as vacant or unclassified as well as units with respect to which information previously obtained was determined to be inaccurate or incomplete (J.A. 48-52). Upon the completion of Followup Two, the Bureau issued a revised population count for the City of Denver of 491,651, an increase of approximately 36,000 from the initial figures (J.A. 57).[6]

2. On September 3, 1980, petitioner McNichols, the Mayor of Denver, and the City and County of Denver filed this action for declaratory and injunctive relief in the United States District Court for the District of Colorado (J.A. 1, 7-23).[7] Petitioners alleged that the Census Bureau's vacancy rate for Denver was arbitrary and unreasonable and that the Bureau's population figures for Denver accordingly reflected a substantial undercount of the City's popu-

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[6] The local review program contributed only 504 additional people to the revised population figure (J.A. 56). As part of its response to the City's challenge to the Bureau's vacancy figures, the Bureau had its employees conduct a third check of vacancies in selected areas; no errors were uncovered (J.A. 55-56, 63-68).

[7] The complaint named as defendants the Secretary of Commerce, the Department of Commerce, the Bureau of the Census and the Bureau's director and regional director (J.A. 7, 9).

lation (J.A. 12-16).[8] As a result, petitioners contended, Denver would be underrepresented in Con-

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[8] In support of their theory of a substantial Census Bureau undercount of Denver's population, petitioners relied in part on population estimates and projections prepared by the Denver Regional Council of Governments (DRCOG), which showed that the population of Denver grew from 514,800 recorded in the 1970 census to more than 520,000 in 1977 through 1980 (J.A. 41; see Pet. Br. 7). The Bureau's own population estimates for Denver during the 1970's (which were based on three independent estimating techniques), however, reflected a steady decline in population to well under 500,000. The table below contains the Bureau's population estimates for Denver from 1971 through 1979:

ESTIMATES OF THE POPULATION FOR THE CITY AND COUNTY OF DENVER, COLORADO: JULY 1, 1971 THROUGH JULY 1, 1979

(Estimates rounded to the nearest hundred)

Year	Census Bureau Estimate
July 1, 1971	518,100
July 1, 1972	514,100
July 1, 1973	515,600
July 1, 1974	504,200
July 1, 1975	486,500
July 1, 1976	484,300
July 1, 1977	477,600
July 1, 1978	474,700
July 1, 1979 (provisional)	472,500

The figures for 1971 through 1977 come from Bureau of the Census, *Current Population Reports, Federal-State Cooperative Program for Population Estimates, Series P-26* (hereinafter, "*Current Population Reports, Series P-26*") No. 17, at 3 (Feb. 1973); *Current Population Reports, Series P-26*, No. 62, at 3 (Apr. 1974); *Current Population Reports, Series P-26*, No. 103, at 3 (Apr. 1975); *Current Population Reports, Series P-26*, No. 75-6, at 3 (Aug. 1976); *Current Population Re-*

gress and in the state legislature because under Colorado law apportionment of congressional districts and state legislative districts is based on the official census count (J.A. 10-12, 16). Petitioners also claimed that because of the Census Bureau's alleged undercount, Denver would be deprived of certain federal funds to which it otherwise would be entitled under federal grant-in-aid programs that distribute benefits on the basis of population (J.A. 12, 16). The complaint requested, *inter alia*, that the district court (1) declare the Bureau's methods of conducting the census and computing the popula-

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ports, Series P-26, No. 76-6, at 3 (July 1977); *Current Population Reports, Series P-26*, No. 77-6, at 3 (Apr. 1979); *Current Population Reports, Series P-26*, No. 78-6, at 3 (Nov. 1979). The figures for 1978 and 1979 have been released for general statistical use but have not yet been released in published form.

The Census Bureau has informed us that the differences between its estimates and those of the DRCOG are attributable to a variety of factors, including the use of different methodologies and different data reflecting population change. The most significant limitation in the methodologies employed by the DRCOG is that the DRCOG estimates depend heavily on 1960-1970 population trends and relationships. However, demographic patterns during the 1970's were considerably different from those observed in the 1960's. For example, the average size of household dropped dramatically in the 1970's as the trend toward single and childless couple households increased. The "housing unit" method used by DRCOG, which is based on many factors derived from 1960-1970 trends, fails to take into account the decline in household size and the increase in demolitions and abandonments that took place during the 1970's. Similarly, the "auto registration" method utilized by DRCOG is also based on trends observed during the 1960's, and overlooks the increased trend toward multiple automobile ownership during the 1970's.

tion figure for Denver to be unreasonable and invalid; (2) grant petitioners a right of access to the "records, data and information" on which the Bureau's vacancy rate for Denver was based; (3) require the Bureau to accept and take into consideration the data provided by Denver concerning the City's vacancy rate; and (4) determine Denver's vacancy rate (J.A. 21-22).[9]

While the case was pending in the district court, petitioners filed a request for production of the Census Bureau's updated address list, known as the Followups Address Registers (FARs) (J.A. 111-112).[10] The Bureau argued in response that the FARs were privileged from disclosure under the confidentiality provisions of the Census Act (Pet. Br. App. A-2).

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[9] Petitioners initially sought a temporary restraining order keeping open the Census Bureau's Denver offices. The parties agreed, however, that the offices could be closed so long as the Bureau kept its records in Denver for the duration of the lawsuit (J.A. 31-32). Petitioners then sought a preliminary injunction requiring, in essence, that the Bureau cooperate with the City in verifying the Bureau's vacancy data (J.A. 74-75). The district court has not yet ruled on the request for a preliminary injunction.

[10] As we have explained above (page 4, *supra*), the original master address registers were developed from commercial mailing lists, from postal checks and from preenumeration canvassing. The FARs, which are similar to the master registers, contain additional information received in response to the census questionnaires and to the followup interview programs. None of the information concerning the vacant or occupied status of housing units was recorded on the FARs without verification through either the questionnaires or followup interviews. Petitioners are therefore in error in asserting (Br. 16) that the Census Bureau's figures concerning vacant units are the result of "deduction."

On September 17, 1980, the district court rejected the Bureau's confidentiality claim and granted petitioners' discovery request (Pet. Br. App. A-1 to A-6). The court reasoned that petitioners would not be able to verify the Bureau's vacancy figures "unless [petitioners] can discover the FARs, which will tell [petitioners] *which dwellings* the Bureau counted as vacant as of April 1, 1980. In other words, to deny [petitioners] discovery of this information will essentially deny it any meaningful ability to challenge the Bureau's determination" (*id.* at A-3; emphasis in original). Accordingly, the court issued an order providing, *inter alia*, that (*id.* at A-4 to A-5):

> (1) respondents must produce the FARs for Denver, or, alternatively, a list of vacant addresses derived from the FARs;
>
> (2) all names and references that might identify census respondents must be deleted;
>
> (3) all City employees given access to the information must take the same secrecy oath as Census Bureau employees (see 13 U.S.C. 23(c));
>
> (4) the information obtained may not be used for any purpose except to seek adjustment of the 1980 census figures for Denver; and
>
> (5) Census Bureau officials may at their option accompany City employees seeking to verify the Bureau's vacancy data.

On appeal,[11] the court of appeals reversed (Pet. Br. App. B-1 to B-5), holding that the district court's

[11] The district court certified its order for immediate appeal under 28 U.S.C. 1292(b) and issued a temporary stay (J.A. 117). The court of appeals allowed the interlocutory appeal and continued the stay of the district court's disclosure order (J.A. 118-119).

discovery order violated the confidentiality provisions of 13 U.S.C. 9. The court concluded that "Congress has the power to make census information gathered at its direction immune from discovery" and that "[b]oth the history of the Census Act and the broad language of the confidentiality provisions of § 9 make abundantly clear that Congress intended both a rigid immunity from publication or discovery and a liberal construction of that immunity that would assure confidentiality" (Pet. Br. App. B-4). In rejecting petitioners' argument that they are entitled to the information because without it they would be unable to mount a meaningful challenge to the Bureau's population count for Denver, the court observed that "Congress has neither made nor implied such an allowance in its prohibition and no authority is given for the notion that Congress is constitutionally required to yield to such an argument" (*ibid.*). In light of the unequivocal congressional bar to disclosure of raw census data, the court of appeals ruled that the district court was without authority to fashion protective devices purporting to preserve the confidentiality mandated by statute (*ibid.*).

SUMMARY OF ARGUMENT

In *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981), this Court granted review to consider whether Census Bureau address lists must be disclosed to local government officials pursuant to a Freedom of Information Act request. Many of the arguments against disclosure of census material in the FOIA context are pertinent to the closely related issue presented in this case: whether local officials are entitled to disclosure of Census Bureau address lists pursuant to a discovery request made in the course of

a civil action challenging the census count for a particular locality. In both cases, disclosure of the Bureau's address lists would be contrary to the intent of Congress, as expressed in the confidentiality provisions of the Census Act, 13 U.S.C. 8(b) and 9(a), to prohibit Census officials from disclosing all raw census data, including addresses, that relate to particular individuals. Petitioners and amici offer no convincing reasons for disregarding the clear intent of Congress.

A. As we have discussed in our brief in *Baldrige* v. *Shapiro*, *supra*, lists of addresses compiled by the Census Bureau in the course of conducting the census are within the confidentiality mandate of the Census Act. There is no merit to petitioners' contention that disclosure of the Bureau's address lists is not barred by the Census Act because petitioners intend to use the information for a "statistical purpose," under 13 U.S.C. 9(a)(1). The release of raw census data to a person outside the Census Bureau in order to facilitate a challenge to the accuracy of the census is not one of the "statistical purposes for which [the data are] supplied," within the meaning of 13 U.S.C. 9(a)(1). In any event, even if petitioners' proposed use is a proper "statistical" purpose under Section 9(a)(1), disclosure is nevertheless barred by the other confidentiality provisions of the Act, 13 U.S.C. 8(b) and 9(a)(2).

Nor is there merit to petitioners' claim that the confidentiality provisions of the Census Act are designed merely to protect the identities of census respondents. Section 9(a)(2) states unequivocally that the Secretary of Commerce may not make any publication of census material that could identify "the *data* furnished by any particular establishment or individual." 13 U.S.C. 9(a)(2) (emphasis added).

Finally, petitioners err in asserting that the Census Act does not bar disclosure because no harm will result from divulging a bare list of addresses. Disclosure of the Bureau's master address registers—or a list of vacant dwelling units derived from the registers—would reveal to local officials that particular buildings are used for residential purposes and that particular units not included on the list of vacant dwellings are occupied. Release of this information, which is ordinarily confirmed by or on behalf of census respondents during the enumeration process, could uncover the existence of housing violations and would undermine the purpose of the Census Act's confidentiality provisions.

B. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party may discover any relevant matter that is "not privileged." A privilege may be established by constitutional provision, by statute, or by common law rule. As the Advisory Committee's Notes to the portion of the Federal Rules of Evidence concerning privileges confirm, the Census Act establishes a privilege barring official disclosure of census information in judicial proceedings.

St. Regis Paper Co. v. *United States*, 368 U.S. 208 (1961), strongly supports the view that raw census data relating to individual census respondents are absolutely privileged from disclosure by census officials. In the course of "strictly construe[ing]" the Census Act, the Court observed that Congress had restricted the use of census information "while in the hands of * * * government officials." 368 U.S. at 218. The court of appeals below (Pet. Br. App. B-4) and the Second Circuit in *Carey* v. *Klutznick*, 653 F.2d 732, 738 & n.29 (1981), therefore correctly concluded that the Census Act's confidentiality provisions absolutely bar discovery of Census Bureau address lists.

Furthermore, nothing in the language or history of the Census Act suggests that Congress contemplated that the confidentiality requirements of the Act could be overcome whenever a litigant asserted a need for census information in civil discovery. Little purpose would be served by the Act's elaborate confidentiality protections if, as petitioners argue, local government officials need only file a lawsuit challenging the census results, and perhaps agree to have its representatives sworn to secrecy, before they could have access to raw census data. Such unrestricted access in selected cases would also frustrate the congressional intent to ensure candor so essential to the success of the census process.

C. Petitioners contend that recognition of an absolute privilege prohibiting disclosure of the Census Bureau's address lists would effectively impede their ability to challenge the accuracy of the census count, thus diluting Denver's voting strength in Congress and in the state legislature and depriving Denver's residents of their constitutional right to equal representation. This argument is insubstantial for several reasons.

To begin with, there is no basis for asserting the denial of a constitutional right merely because a privilege has made a party's proofs more difficult or impossible. Privileges by definition deprive parties and the courts of relevant information. However, once a privilege has been recognized in law because it serves to achieve a greater social benefit, the parties must attempt to prove their case without the privileged information.

Second, petitioners are simply incorrect in asserting that the address lists are indispensable to their challenge to census accuracy and that they are therefore entitled to the lists because their need for the infor-

mation outweighs the Census Bureau's need to keep the information confidential. During the local review program, the Bureau provided Denver with housing and vacancy figures for each enumeration district within the city. Denver was free to develop evidence controverting the Bureau's figures.

Finally, petitioners' right to equal representation is not violated by recognizing a privilege for Census Bureau address lists. The Court has recognized that census results "are inherently less than absolutely accurate" (*Gaffney* v. *Cummings*, 412 U.S. 735, 745 (1973)), and it has never suggested that the constitutional principle of "one man, one vote" requires precision in the census count. Moreover, petitioners do not claim that the State of Colorado would receive additional seats in Congress if the alleged undercount for Denver were corrected, and there is no requirement that the state legislature rely upon the census figures in apportioning congressional and legislative districts within Colorado. Accordingly, petitioners cannot show that the failure to reveal confidential census information would result in the denial of their right to equal representation.

ARGUMENT

ADDRESS LISTS COMPILED BY THE BUREAU OF THE CENSUS ARE PRIVILEGED FROM DISCLOSURE IN CIVIL DISCOVERY

In this case, petitioners, a local governmental entity and its chief public official, initiated a civil action challenging the 1980 decennial census results for their locality. Thereafter, in the course of the lawsuit, petitioners filed a discovery request, seeking disclosure of address lists compiled and used by the

Census Bureau in conducting the census. The disclosure issue presented here is thus very similar to that presented in *Baldrige* v. *Shapiro*, cert. granted, No. 80-1436 (Apr. 27, 1981), where a local government official seeks access to Census Bureau address lists under the Freedom of Information Act. The government's brief in *Baldrige* v. *Shapiro*, *supra*, sets forth our position that Congress intended to prohibit the Secretary of Commerce and his agents from disclosing all raw census material relating to individuals, including address lists, and that such lists are therefore exempt from disclosure under the FOIA. No different result should obtain here, where disclosure of the same type of census material—Census Bureau address lists—is sought in civil discovery.

A. The Census Act Prohibits Disclosure of Census Bureau Address Lists

Compilation of accurate census data in a nation as vast and diverse as the United States could not be achieved without widespread cooperation among residents of every geographical area and members of every racial, ethnic and economic group. As we have argued at length in our brief in *Baldrige* v. *Shapiro*, *supra* (at 14-38), the language and legislative history of the Census Act, the histories of the FOIA and the Privacy Act, the Census Bureau's longstanding administrative interpretation and important policy considerations all persuasively demonstrate that raw census data relating to individual persons or establishments, including address lists, may not be disclosed to any person or governmental agency outside the Census Bureau.[12] Any such release of Census Bureau

[12] So far as is practicable, we rely on the discussion in our *Baldrige* v. *Shapiro* brief without repeating it here.

address lists would erode public confidence in the confidentiality of census data and thus would subvert the legislative goal of securing maximum voluntary cooperation with the census.

Section 8(b) of the Census Act states unequivocally that the Secretary of Commerce may publish statistical tabulations based on the underlying census data, but may "not disclose the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). And Section 9(a) confirms that the Secretary and his employees may not (1) "use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied," (2) "make any publication whereby the data furnished by any particular establishment or individual under this title can be identified," or (3) "permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports." 13 U.S.C. 3(a).[13] These sweeping provisions prohibit the disclosure of all raw census data relating to individual respondents, including addresses of particular respondents. In other words, under the statutory scheme, only aggregate statistical data may be disclosed to the public, and then only if such disclosure would not reveal information relating to a particular respondent or establishment.

Petitioners argue (Br. 18), however, that their intended use of the census information—to facilitate a challenge to the Bureau's census count for a particular locality—is for a "statistical purpose[] for

[13] All Bureau employees must be sworn to observe the confidentiality provisions of the Act. See 13 U.S.C. 9, 23(c). Violation of these provisions is subject to substantial criminal penalties. See 13 U.S.C. 214.

which that information is supplied" under 13 U.S.C. 9(a)(1), and that therefore disclosure of this data is outside the purview of the Census Act's confidentiality mandate. This argument, which is identical to one adopted by the district court in *Baldrige* v. *Shapiro*, *supra*, should be rejected for the reasons set forth in our brief in that case (at 21-24). Briefly, even if release of the Bureau's address lists would not violate Section 9(a)(1), it would run afoul of both Section 8(b), which bars disclosure of "information reported by, or on behalf of, any particular respondent," and Section 9(a)(2), which prohibits the publication of census data in a manner that could identify the information furnished by any particular establishment or individual. Nothing in the language of Section 9(a)(1) suggests that census material that is subject to the prohibitions against disclosure in other parts of the statute may be released merely because the material is to be used for "statistical purposes." In any event, Section 9(a)(1) plainly limits the use of raw census data to *Bureau* personnel for the *Bureau's* own statistical purposes, not the statistical purposes of a local governmental official or other person seeking to challenge the accuracy of the census. Thus, as the court of appeals correctly concluded (Pet. Br. App. B-4 to B-5), release outside the Bureau of raw data relating to individual respondents, for the purpose of facilitating a challenge to census statistics, is not a "statistical purpose[] for which [the data are] supplied," within the meaning of Section 9(a)(1). See *Seymour* v. *Barabba*, 559 F.2d 806, 809 (D.C. Cir. 1977).

Petitioners also contend (Br. 18, 19, 21) that the Census Act merely prohibits disclosure of informa-

tion that identifies individual census respondents and that a list of addresses, which does not reveal a respondent's identity, is not subject to the Act's confidentiality provisions. If this were indeed the intended meaning of the Act, it would have been easy enough for Congress to enact a statute prohibiting the release of information that might identify census respondents. Section 9(a)(2), however, bars the publication of census material in a fashion that could identify "the *data* furnished by any particular establishment or individual." 13 U.S.C. 9(a)(2) (emphasis added). Thus, contrary to petitioners' contention, this provision is not limited to protecting the identities of census respondents, but extends to *information* (other than in aggregate form) supplied by *any* establishment or individual.

Furthermore, other provisions of the Census Act reflect the unequivocal intent of Congress to assure the public that raw census data will be kept strictly confidential, regardless whether the information was supplied by "sources other than the specific [respondents]." *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808. Section 6(c) of the Act directs the Secretary, to the maximum extent possible, to obtain information from other federal agencies, local governmental entities and private sources, instead of conducting direct inquiries. 13 U.S.C. 6(c). The Census Act defines "respondent" as any corporation, individual, or other organization or entity that "reported" information, "*or on behalf of which information was reported*," in response to a questionnaire, inquiry, or other request of the Bureau. 13 U.S.C. 1(3) (emphasis added). Section 8(b), in turn, permits the release of only those statistical materials "which do not disclose the information reported by, or on behalf

of, any particular respondent * * *." 13 U.S.C. 8(b) (emphasis added). By expressly applying the confidentiality mandate not only to information "reported by" respondents, but also to information reported "on behalf of" respondents, Congress clearly expressed its desire to protect all raw census data pertaining to individual census respondents.

Moreover, both Congress and the executive officials responsible for conducting the census have repeatedly expressed the view that all raw census data, including address lists, must be kept strictly confidential. We have reviewed the relevant historical materials in our brief in *Baldrige* v. *Shapiro* (at 16-18, 25-33) and we rely upon that discussion here, except to note that in arguing that the Census Act does not bar disclosure in this case, petitioners and amici virtually ignore this strong evidence of congressional intent.[14]

Finally, petitioners assert (Br. 17) that the lists of addresses that it seeks to inspect were not compiled "through the census questionnaire system," and they contend (Br. 21) that disclosure is not proscribed by the Census Act because no harm will result from divulging this information (see also MDL Amici Br. 24). As we have pointed out in our brief in *Baldrige* v. *Shapiro* (at 20-21, 36-37), however, the Bureau's address registers reveal the residential status of each building listed and the number of dwelling units it contains. This is the type of information that is ordinarily confirmed by or on behalf

[14] Petitioners' only reference to the legislative history of the Census Act (Br. 19-20) concerns the amendment overruling this Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961). As we show below (pages 28-29, *infra*), petitioners misread the import of this legislative history.

of census respondents in the course of the enumeration process. Moreover, disclosure of a list of addresses might reveal various unlawful or untaxed dwellings, *e.g.*, the occupancy of "abandoned" dwellings or the residential use of lofts zoned only for commercial purposes. Even if the address registers could readily be redacted to produce a list of vacant housing units, disclosure of such a list would be contrary to both the letter and the spirit of Sections 8(b) and 9(a) of the Census Act. By disclosing the addresses of vacant units, the Bureau necessarily would also be revealing to local officials which units are occupied, thus enabling those officials to discover cases of unlawful occupancy. By the same token, disclosure of the vacancy status of certain dwelling units might be contrary to the interests of certain individuals upon whom the Census Bureau relies for information. For example, property owners or neighbors might be willing to disclose to census enumerators that a particular residence is vacant, but would not want that information disseminated outside the Bureau, for fear that the information might have adverse consequences with respect to property values or insurance coverage. Accordingly, the release of such information, particularly to the local government, would inevitably result in a decline in the candor and cooperation so essential to the census process.[15]

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[15] See C. Kaplan & T. Van Valey, *Census '80: Continuing the Factfinder Tradition* 81 (Department of Commerce 1980):

> There are some people who are suspicious that the information they give to the Bureau of the Census will somehow be used against them and hence they deliberately withhold information. For example, families with children who live in dwellings where children are not per-

B. Census Bureau Address Lists Are Absolutely Privileged And Thus Are Not Subject to Civil Discovery

As discussed above and in our brief in *Baldrige* v. *Shapiro*, Congress has established a policy of strict confidentiality with respect to all raw census data relating to individual respondents, including address lists. Petitioners nonetheless argue that they are entitled to discovery of the Bureau's address lists because those lists are assertedly relevant to the subject matter of the instant lawsuit. But nothing in the language or history of the Census Act suggests that Congress contemplated that the confidentiality requirements of the Act could be overcome whenever a litigant asserted a need for census information in civil discovery. Indeed, there would be little purpose to the Census Act's elaborate confidentiality protections if, as petitioners suggest, a local government need only file suit challenging the census results, and perhaps agree to have its representatives sworn to secrecy, before it would be entitled to rummage freely through raw census information. Any such widescale right of access to census data is completely incompatible with the Census Act's statutory scheme and underlying purpose.

The relaxed confidentiality rule advocated by petitioners for discovery in civil suits challenging the census results for a particular locality would diminish, if not eliminate altogether, public confidence in

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mitted might fail to report them. Individuals who have entered the country illegally might fear detection and deportation and avoid being counted altogether. Others live in condemned houses and fear eviction or prosecution for trespassing if discovered. Still others have living arrangements that, if discovered, could result in the curtailment of their welfare or social security allowances.

the census process and would have the long-term effect of reducing the accuracy of future censuses by deterring numerous individuals from cooperating in the census. Certain individuals, particularly those who believe they have something to hide from local authorities (see page 21, *supra*), are unlikely to distinguish among voluntary Census Bureau disclosures of census information, FOIA disclosures, and court-ordered disclosures in discovery proceedings. The result of any such disclosures, once they become known, will be the reluctance of many to participate at all in the census, or the preparation of misleading or inaccurate census responses. Only an absolute bar to all disclosures of raw census data is sufficient to assure census participants that their census communications are inviolate and that their census participation is risk-free. Since Congress has made absolutely clear its determination to obtain accurate census data through a governmental pledge of confidentiality, the Census Act's confidentiality guarantees must be read to extend to all types of disclosures that might impair cooperation, including disclosures in civil litigation.

The federal discovery rules recognize that Congress may enact legislation prohibiting discovery of certain materials. Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that a party "may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action * * *" (emphasis added). The term "not privileged," as used in Rule 26(b), refers to "privileges" as that term is understood in the law of evidence. See *United States* v. *Reynolds*, 345 U.S. 1, 6 (1953). A privilege may be established by constitutional provision, by common law rule, or by

statute, such as a statute that makes certain government documents confidential. See *United States* v. *O'Neill*, 619 F.2d 222, 229 (3d Cir. 1980); *Association for Women in Science* v. *Califano*, 566 F.2d 339, 344 (D.C. Cir. 1977). "Frequently statutes requiring particular kinds of reports to be made to the government will provide that such reports are to be kept confidential. Statutes of this kind are a bar to discovery * * *." 8 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2019, at 160 (1970). See 8 J. Wigmore, *Evidence* § 2377, at 781 (McNaughton rev. 1961).

Congress explicitly recognized the existence of such statutory privileges when it enacted the Federal Rules of Evidence. Rule 501 provides that the rules as to privileges in the federal courts shall be governed by common law principles, "[*e*]*xcept as* * * * *provided by Act of Congress*" (emphasis added). The Advisory Committee's Notes specifically identified the Census Act as one of the federal statutes that creates a privilege from disclosure in judicial proceedings:

> [P]rivileges created by act of Congress are not within the scope of these rules. These privileges do not assume the form of broad principles; they are the product of resolving particular problems in particular terms. Among them are included such provisions as 13 U.S.C. § 9, generally prohibiting official disclosure of census information and conferring a privileged status on retained copies of census reports * * *.

Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 231 (1973).[16]

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[16] Although Congress made major revisions in the Advisory Committee's draft of Rule 501, the introductory state-

In light of the overwhelming evidence of Congress' intent to prohibit official disclosure of all raw census data, both the court of appeals below (Pet. Br. App. B-4) and the Second Circuit in *Carey* v. *Klutznick*, 653 F.2d 732, 739 & n.29 (1981), correctly concluded that the Census Act's confidentiality provisions absolutely bar discovery of Census Bureau address lists. Cf. *Seymour* v. *Barabba*, *supra*, 559 F.2d at 808 (13 U.S.C. 9 "is a flat barrier to disclosure with no exercise of discretion permitted"). Thus, even if the material in question may be "relevant" to the subject matter of this lawsuit, that does not make the material any less "privileged." Under Rule 26, only matter that is "not privileged" may be subject to civil discovery. Accordingly, there is no merit to petitioners' argument that the address lists are disclosable in civil discovery.[17]

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ment of the rule, excepting from its scope statutorily enacted privileges, was not changed. Accordingly, the Advisory Committee's Notes to its draft rule are pertinent in examining the rule in its final form. See 10 *Moore's Federal Practice* § 501.02 (2d ed. 1979).

[17] Amici contend (MDL Br. 17-19; N.Y. Br. 20-22) that the Census Act cannot be construed as creating an absolute privilege protecting address lists from civil discovery because the Act does not specifically concern itself with "disclosure" in judicial proceedings. This semantic contention, focusing on the difference between "publication" and "disclosure," is insubstantial and has been rejected by the Court in other contexts where, as here, Congress clearly sought to prohibit the release of certain information, however accomplished. See *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980). Moreover, while a claim of statutory privilege demands that "[t]he words of the particular statute * * * be very closely examined with awareness that the courts are reluctant to find a privilege where not required * * * to do so" (8 J. Wigmore, *supra*, § 2377, at 781; footnote omitted), it is not true that the

This Court's decision in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208 (1961), strongly sup-

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privilege must invariably be an express one. On the contrary, a privilege may in appropriate circumstances be implied from a statute's language and purpose. *Ibid.* Unlike cases such as *Freeman* v. *Seligson*, 405 F.2d 1326 (D.C. Cir. 1968), relied upon by amici (MDL Br. 18-19; N.Y. Br. 22), where the statute at issue only prohibited "publication" of certain information, the Census Act, in addition to barring the Secretary from making a publication that might identify "data furnished by any particular establishment or individual," also prohibits the Secretary from "using" census information "for any purpose other than the statistical purposes for which it is supplied" (13 U.S.C. 9(a)(1)) and from "disclos[ing] the information reported by, or on behalf of, any particular respondent." 13 U.S.C. 8(b). Indeed, this Court in *St. Regis Paper Co.* v. *United States*, *supra*, 368 U.S. at 218, assumed that census information in the hands of the Census Bureau is immune from legal process despite the absence of specific language in the Census Act prohibiting disclosure in judicial and administrative proceedings. In addition, amici's reference (MDL Br. 17 n.12; N.Y. Br. 21 n.19) to 13 U.S.C. 302, which authorizes the Secretary of Commerce to promulgate rules governing "confidentiality, publication, or disclosure" of information collected pursuant to 13 U.S.C. 301 pertaining to exports and imports, is unavailing. Section 301 is an elaborate disclosure statute, detailing the types of information to be reported. In contrast, Sections 8(b) and 9(a) allow only very limited disclosure of census information and strictly prohibit disclosure, publication and use beyond those statutorily-defined limits. Thus, unlike Section 302, where Congress left to the Secretary the task of setting limits on disclosure, in Sections 8(b) and 9(a) Congress incorporated rigid restrictions on disclosure into the statute itself.

Alternatively, amici argue (MDL Br. 23 n.15; N.Y. Br. 25-27) that the Census Act provides only a "qualified privilege," permitting the courts to balance the Bureau's confidentiality concerns against a party's litigation needs. As one commentator has noted, however, "the balancing process is unavailable as a mechanism for discretion when the alleged

ports our submission that the confidentiality provisions of the Census Act establish an absolute privilege against disclosure by census officials of raw census data relating to individual respondents. Although the Court in *St. Regis* ruled that the Census Act as it then existed did not immunize from legal process copies of census reports retained by private businesses, the decision did not question the statutory obligation of Census Bureau personnel to preserve the confidentiality of census information. Indeed, in the course of "strictly construing" the Census Act, the Court emphasized that Congress had restricted the use of census information "while in the hands of those persons receiving them, *i.e.*, the government officials." 368 U.S. at 218. Because it found that "the prohibitions against disclosure contained in § 9 run only against the officials receiving such information" (368 U.S. at 217), the Court refused to extend the privilege created by the Census Act to reporting companies that were not legally required, but had voluntarily chosen, to retain copies of their census reports. The Court noted that its conclusion was buttressed by the fact that the reporting companies were compelled by statute to furnish the same information contained in the reports to other government agencies in response to adminstrative subpoenas. 368 U.S. at 219-220.

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privilege is statutory. If the document at issue falls within the ambit of the statutory provision, the need of the litigant—no matter how great—is of no consequence." Note, *Discovery of Government Documents and the Official Information Privilege*, 76 Colum. L. Rev. 142, 152 (1976) (footnote omitted). In any event, even if the Court accepts amici's balancing approach, petitioners have not demonstrated that their need for the address lists outweighs the compelling public policies underlying the Census Act's confidentiality provisions. See pages 34-36, *infra*.

Following the decision in *St. Regis*, Section 9 of the Census Act was amended to make explicit Congress' intent to immunize from legal process copies of census reports retained by census respondents. Petitioners point out (Br. 20) that in enacting this amendment Congress specifically rejected a provision that would have prevented use of "any [census] information, reports and other data" in judicial and administrative proceedings. But the rejection of this language does not reflect a congressional intent to permit raw census data in the possession of the Census Bureau to be subject to discovery in civil litigation. On the contrary, the 1962 legislation was intended merely to overrule *St. Regis*, and accordingly, the language of the amendment focused on copies of reports held outside the Census Bureau. See S. Rep. No. 2218, 87th Cong., 2d Sess. 2 (1962); H.R. Rep. No. 2437, 87th Cong., 2d Sess. 2, 3-4 (1962). Since *St. Regis* did not question, and indeed endorsed, the Bureau's own statutory obligation to keep census information confidential, there was no need for Congress to legislate on that subject.

In addition, petitioners ignore the fact that Congress rejected the proposed prohibition on disclosure of "any [census] information, reports, and other data" at the urging of several government officials, who stated that "care must be taken not to extend confidentiality to such an extent as to interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information." H.R. Rep. No. 2437, *supra*, at 5 (letter of Phillip S. Hughes, Assistant Director for Legislative Reference, Bureau of the Budget); see *id.* at 7 (letter of Secretary of Commerce Hodges); *id.* at 8 (letter of Deputy Attorney General Katzenbach); *id.* at 10, 11 (letters of Federal Trade Commission Chairman Dixon). See also *In re FTC Line of Busi-*

ness Report Litigation, 595 F.2d 685, 699-700 (D.C. Cir.), cert. denied, 439 U.S. 958 (1978). Thus, the legislative history on which petitioners rely merely shows that Congress declined to provide blanket immunity from legal process, with respect to information provided to the Census Bureau, to every individual and establishment that responded to the census.[18] The approach adopted by Congress was fully consistent with this Court's recognition in *St. Regis* that census respondents are obligated, in response to subpoenas or other legal process, to provide the requested information even if that information previously had been included in their census reports. 368 U.S. at 219-220. Thus, both the *St. Regis* decision and the amendment overruling that decision are in accord with our submission that raw census data in the possession of the Census Bureau—in contrast to information in the possession of census respondents—is absolutely privileged and may not be disclosed in response to a discovery request.

Similarly, in *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958), two steel companies sought to condition their compliance with a government discovery request in an antitrust suit on the government's willingness to turn over to them census reports filed by other major steel producers. In rejecting the defendant steel companies' position, Judge Weinfield held that

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[18] As the letters from the government officials suggest, adoption of the proposed language would have led to absurd results. For example, if an individual census respondent were a party to a lawsuit, the individual could have refused to provide his name, address and any other pertinent information that had been supplied in response to the census questionnaires.

> [t]he language of the statute is clear and unambiguous. There is no basis for engrafting further exceptions upon those specified in the statute. One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests. Accordingly, Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse.

21 F.R.D. at 569-570 (footnote omitted). Congress, despite numerous amendments to the Census Act over the years, has never suggested that the courts in *St. Regis* and *Bethlehem Steel* erred in recognizing as absolutely privileged the raw census data held by the Census Bureau.

The district court below, like the district court in *Baldrige* v. *Shapiro*, nevertheless attempted to circumvent the Census Act's statutory privilege against disclosure of census information by directing that petitioners' employees who are given access to the address lists must be sworn to the same oath of secrecy required of Census Bureau personnel, and by specifically limiting unauthorized disclosure, publication and use of the material (Pet. Br. App. A-4 to A-5). As the court of appeals observed (Pet. Br. App. B-3), these provisions were a tacit acknowledgment by the district court that its order "constituted an

evasion of congressionally mandated confidentiality." If disclosure of the materials sought by petitioners does not violate 13 U.S.C. 9, then the oath requirement imposed by the district court is unnecessary and meaningless. See 13 U.S.C. 214. If disclosure of the materials does violate 13 U.S.C. 9, then release to petitioners is barred because the materials are privileged matter. In sum, as the court of appeals correctly concluded (Pet. Br. App. B-4), "in the face of the congressional prohibitions, the trial court [was without] authority to substitute its own techniques for protecting the confidentiality mandated by the statute."

C. The Privilege Protecting Census Bureau Address Lists From Disclosure Does Not Offend The Constitutional Guarantee of Equal Representation

Petitioners point to the district court's observation that access to the address lists is necessary to give petitioners "any meaningful ability to challenge the Bureau's determination" (Pet. Br. App. A-3), and they contend (Br. 12-16) that recognition of an absolute privilege denying disclosure of the address lists would impede attainment of an accurate census count, thus diluting the City of Denver's voting strength and denying to Denver's residents their constitutional right to equal representation. This argument is insubstantial.[19] In the first place, no con-

[19] Petitioners' brief in the court of appeals did not advance the contention that they are entitled to discovery in order to assure their constitutional right to equal representation. At oral argument below, however, petitioners' counsel touched upon this contention. The court of appeals apparently was adverting to petitioners' constitutional position when it stated that "no authority is given for the notion that Congress is constitutionally required to yield to such an argument" (Pet. Br. App. B-4).

stitutional question is posed when a privilege makes a litigant's proofs more difficult or impossible. Moreover, petitioners are incorrect when they assert that the address lists are indispensable to their challenge to census accuracy. Finally, petitioners err in claiming that the nondisclosure of the address lists will inevitably result in a deprivation of their right to equal representation.

1. The apparent premise of petitioners' argument is that whenever a plaintiff initiates a lawsuit based upon a constitutional claim, the defendant is barred from invoking an absolute evidentiary privilege if the privilege would effectively prevent the plaintiff from proving his case. This premise is fatally flawed. A privilege, by definition, deprives litigants and the court of relevant information and in that sense impedes the court's search for the truth—which is precisely why the law does not favor privileges. See *Trammel* v. *United States*, 445 U.S. 40, 50 (1980). However, where, as here, society determines by constitution, statute, or common law rule that absolute confidentiality is required because of public policy considerations more important than a court's search for truth in particular lawsuits, that ends the matter, and litigants must prove their cases, as well as they are able, without the privileged information. The "privilege will often impose a grievous hardship, for it may deprive parties * * * of power to assert their rights or to defend themselves. That is a consequence of any evidentiary privilege." *United States* v. *Coplon*, 185 F.2d 629, 638 (2d Cir. 1950) (L. Hand, J.), cert. denied, 342 U.S. 920 (1952).[20] No reason

[20] See also *United States* v. *Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), cert. denied, No. 80-436 (Jan. 12, 1981): "[T]he concept of a trial as a search for the truth has always failed

is apparent why Judge Hand's common sense approach should not apply to all lawsuits, including petitioners', whether brought under the Constitution, a statute, or the common law.

Petitioners' suggestion that privileges be abrogated in "constitutional" suits [21] would mean, of course, that

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of full realization whenever important facts are shielded from disclosure because of a lawful privilege. The key fact needed to prove a defendant's innocence may be contained in a client's privileged admission to his attorney, or a husband's privileged admission to his wife, as well as in the testimony of a witness protected by the privilege against self-incrimination."

As Judge Hand recognized in *Coplon* (185 F.2d at 638), the government as plaintiff or prosecutor cannot always invoke its privilege without consequences to itself (*e.g.*, dismissal of its action). See *Roviaro* v. *United States*, 353 U.S. 53 (1957). But that is not so when the government is haled into court involuntarily as a defendant. In such cases, a plaintiff must prove his case without the privileged materials, and if he cannot do so, must face dismissal of his lawsuit. See *United States* v. *Reynolds*, *supra*; *Totten* v. *United States*, 92 U.S. 105 (1875); cf. *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc).

[21] The "constitutional" nature of petitioners' suit is open to question. It is true that petitioners seek judicial review of the accuracy of the census in part because an undercount of Denver's population count allegedly would dilute the voting power of Denver's residents. But, while this Court's cases clearly establish a constitutional right to equal representation so far as is practicable, this Court has rejected petitioners' view that the constitutional "one man, one vote" principle requires precision in the census count. See *Gaffney* v. *Cummings*, 412 U.S. 735, 745-747 (1973). Moreover, as we demonstrate below (pages 36-39, *infra*), the allocation of electoral districts within each state is the function of the state legislature, and there is no constitutional (or statutory) requirement that the legislature rely exclusively on census figures in the allocation process.

there could be no absolute privileges at all, and that in "constitutional" suits a party's privilege claim, even if traditionally considered absolute, always would be weighed against another party's litigation need for the privileged information. Thus, under petitioners' theory, the attorney-client or doctor-patient privileges and perhaps even the privilege against self incrimination presumably would evaporate when a plaintiff asserting a constitutional claim alleged an indispensable need for the privileged information. Petitioners' "constitutional" claim of entitlement to privileged Census Bureau material—for which petitioners fail to cite any authority—thus falls of its own weight and does not warrant this Court's serious attention.

2. Petitioners and amici are incorrect in repeatedly asserting that the Census Bureau's address lists are indispensable in order to mount a meaningful challenge to the accuracy of the census count for a particular locality, and that they are therefore entitled to the lists under a balancing approach (see note 17, *supra*). During the local review program, for example, the Census Bureau provided each local jurisdiction, including Denver, with housing unit totals and vacancy figures for each enumeration district within that jurisdiction (see J.A. 35, 47). There was nothing to prevent Denver from taking its own surveys in each of the enumeration districts or otherwise developing evidence controverting the Census Bureau's figures. Indeed, Denver did conduct its own surveys for approximately one-third of the city (J.A. 34-37), albeit in a manner that the Census Bureau considered defective (J.A. 69-71). Moreover, numerous other cities successfully demonstrated enumeration problems by analyzing the Bureau's preliminary aggregate data; as a result, the Bureau investigated

the problems and increased the population count (primarily as a result of the addition of housing units) where such action was warranted by the findings.

While it perhaps would be *easier* for local government officials such as petitioners to verify the Census Bureau's figures on an address-by-address basis through a cross-comparison with the Bureau's lists, mere convenience cannot be the decisive factor when, as here, local officials seek access to information whose confidentiality has been guaranteed by Congress. Therefore, even if this Court were inclined to permit breaches of census confidentiality based on indispensable litigation need, no disclosure may be ordered here because petitioners have made no showing that reviewing the Census Bureau's address lists is the only available method of demonstrating census inaccuracy.[22]

Furthermore, as we have already shown (page 21, *supra*), release of raw census data pursuant to civil discovery requests, regardless of the litigant's asserted need for the information, would greatly impair the ability of the Census Bureau to perform its constitutionally mandated task of conducting the decennial census. See *United States* v. *Bethlehem Steel*

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[22] In any event, even if access to Census Bureau address lists were the only available method of checking census accuracy, petitioners have not shown that they are entitled to discovery of those lists in the present circumstances of this case. It is important to keep in mind that petitioners seek discovery of the Bureau's address lists in order to determine which housing units the Bureau counted as vacant as of April 1, 1980. If discovery is permitted, petitioners intend to attempt to show that the Bureau's vacancy figures are in error (see Pet. Br. 17). But it is no longer possible to conduct a reliable check of the vacancy status of housing units as of April 1, 1980; the results of any such effort would be highly suspect and error prone.

Corp., supra; United States v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,383 (S.D.N.Y. 1975).[23] If it became general public knowledge that local officials may (and do) exercise a legal right to demand and obtain access to raw census data in order to check its accuracy for "litigation" purposes, public confidence in the integrity of census data would be severely jeopardized. The resulting loss of public cooperation in the conduct of the census would far outweigh the alleged benefits that petitioners claim will result from recognizing a right of discovery for local officials.

3. Finally, there is no merit to petitioners' contention that according privileged status to the Census Bureau's address lists violates the constitutional principle of "one man, one vote" recognized in this Court's cases. See, *e.g.*, *Wesberry* v. *Sanders*, 376 U.S. 1 (1964); *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969).

The only purpose expressed in the Constitution for the taking of the decennial census is the apportionment of representatives "among the several States according to their respective numbers." Fourteenth

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[23] In *United States* v. *International Business Machines Corp.*, *supra*, the defendant in an antitrust action sought disclosure from the government of raw census data in the form of individual census returns submitted to the Census Bureau by suppliers of electronic data processing products and services. Without addressing the question whether the Census Act creates an absolute privilege exempting the documents from judicial process, the court concluded that the public interest in nondisclosure—to encourage the submission of accurate census data and to protect the privacy of individuals and businesses required by law to submit confidential information to the government—outweighed the asserted needs of the defendant for the information.

Amendment, Section 2. See *Carey* v. *Klutznick*, *supra*, 653 F.2d at 735-736. Petitioners do not claim that the State of Colorado would receive additional seats in Congress if the alleged undercount for Denver were corrected, and indeed, petitioners cannot reasonably make such a claim.[24] Because no constitutional or statutory provision requires the use of the census figures to determine apportionment of legislative or congressional districts within Colorado, petitioners cannot show that the failure to disclose confidential census information will deprive them of their right to equal representation.

Although the Census Bureau does provide in-state population totals to the states pursuant to 13 U.S.C. 141(c), the Bureau does not compel the states to use these in-state census totals in any particular manner. The states are free to adjust census figures for in-state redistricting, or indeed, to conduct their own in-state count, so long as there is a legitimate basis for the state system. As the Court observed in *Burns* v. *Richardson*, 384 U.S. 73, 91 (1966), a state legislative redistricting case, the Constitution "does not require the States to use total population figures derived from the federal census as the standard by which * * * substantial population equivalency is to be measured." Similarly, in *Kirkpatrick* v. *Preisler*, *supra*, 394 U.S. at 535, the Court held that states

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[24] The Census Bureau has informed us that Colorado would need 508,089 persons more than the number transmitted by the President to Congress on January 7, 1981, in order to qualify for an additional seat in Congress (assuming that the census counts for the other states remained the same). Petitioners have never suggested that correction of the Census Bureau's alleged miscount in Denver would result in anything remotely resembling the addition of 500,000 people to the official census count for Denver.

may use non-census data for congressional redistricting in order to reflect population shifts between decennial census counts, so long as the findings on which the adjustments are based are "thoroughly documented and applied throughout the State in a systematic, not an *ad hoc*, manner." Conversely, in *Mahan* v. *Howell*, 410 U.S. 315, 331-332 (1973), the Court concluded that a state legislature's reliance on census figures in apportioning certain legislative districts was impermissible under the particular circumstances. See also *Young* v. *Klutznick*, 652 F.2d 617, 624-625 (6th Cir. 1981); *Federation for American Immigration Reform* (*FAIR*) v. *Klutznick*, 486 F. Supp. 564, 570 n.11 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980), aff'd on remand, No. 80-1246 (D.C. Cir. Nov. 6, 1980), cert. denied, No. 80-975 (Mar. 23, 1981).

Petitioners assert (Br. 14) that Colorado constitutional and statutory provisions require the use of census figures to apportion electoral districts within Colorado. But even if this were so, the features of a particular state's apportionment procedures, as established by state law, are not a sufficient basis for requiring federal officials to reveal confidential information protected from disclosure by federal statute. To hold otherwise would be to stand the Supremacy Clause on its head by permitting the states, in effect, to overrule federal law through enactment of contrary state legislation. In any event, the Colorado provisions upon which petitioners rely merely refer in general terms to the federal census, and nowhere purport to bar the state legislature from requiring adjustments to census data as it sees fit.[25] Thus, ap-

[25] The only provisions of the Colorado Constitution cited by petitioners that refer to the federal census merely tie the

plication of the privilege established by the Census Act's confidentiality provisions to bar discovery of raw census data does not violate petitioners' right to equal representation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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timing of the Colorado reapportionment process to the completion of the federal census and to the availability of census data. Colo. Const. art. V, § 48(1)(a), (e). The cited statutory provisions simply define congressional and legislative districts in terms of "census tracts" and other census subdivisions. Colo. Rev. Stat. §§ 2-1-101 *et seq.*, 2-2-101 *et seq.* (1980).

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